Supreme Court, U.S.
FILED

No. 06-1187 FEB 26 2007

OFFICE OF THE CLERK

In The Supreme Court of the United States

REV. D. PHILIP VEITCH,

Petitioner,

v.

THE HONORABLE GORDON R. ENGLAND, SECRETARY OF THE NAVY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. In determining whether a chaplain's resignation is voluntary, may the Court of Appeals, contrary to the principles of *Sorrells v. U.S.*, 287 U.S. 435 (1932), *Mapp v. Ohio*, 367 U.S. 642 (1961) and *Rochin v. California*, 342 U.S. 165 (1952) ignore gross governmental misconduct, specifically forbidden by statute, that formed the motive, basis, and source of information for the government's adverse action leading to the resignation?

II. May the Court of Appeals ignore the religious nature of conversations between two chaplains disputing sermon techniques and topics in the statutory protection given those sermons that formed the basis for an allegation of disrespect on the part of the junior chaplain?

III. Is the lower courts' failure to confront and sanction obvious and gross government conduct a significant departure from the accepted and usual course of judicial proceedings such that it calls for an exercise of this Court's supervisory power?

PARTIES TO THE PROCEEDINGS

Petitioner, who was Plaintiff-Appellant in the Court of Appeals, is the Rev. D. Philip Veitch, a former Navy chaplain.

Respondents who were Defendants-Appellants in the court of appeals below are the United States Navy and the following persons in their official capacity: Secretary of the Navy (the "Secretary") currently the Hon. Donald C. Winter, (Gordon England when argued to the Court of Appeals); Chief of Naval Personnel, currently Vice Admiral John C. Harvey; Chief of Chaplains Rear Admiral Robert F. Burt; Captain Ronald Buchmiller, Petitioner's former command chaplain in Naples, Italy; and the U.S. Navy.

CORPORATE DISCLOSURE STATEMENT

No party is a Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Reverend D. Philip Veitch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

CITATIONS OF ORDERS AND OPINIONS

The opinion and judgment of the United States Court of Appeals for the District of Columbia is reported as *Veitch v. England*, 471 F.3d 124(D.C. Cir. 2006), and is set forth in the Appendix beginning at A-1. The opinion and judgment of the District Court for the District of Columbia granting the Respondents' motion for summary judgment and is set forth in the Appendix beginning at A-24.

STATEMENT OF JURISDICTION

The judgment for which review is sought was entered by the Court of Appeals for the District of Columbia on November 28, 2006. This Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1254. The District Court had jurisdiction over these actions under 28 U.S.C. §§ 1331, 1343 and 1346, and 5 U.S.C. § 702.

CONSTITUTIONAL PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States.

"...nor shall any person be...deprived of life, liberty, or property, without due process of law...." Due Process of Law Clause of the Fifth Amendment to the Constitution of the United States.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

"An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member." 10 U.S.C. § 6031(a).

"Chaplains shall be permitted to conduct public worship according to the manner and forms of the church of which they are members". Navy Regulations, Article 0817.

STATEMENT OF THE CASE

This case is likely to determine the judicial treatment of governmental misconduct in military civil cases, the protection of free exercise in the military, and whether there may by an establishment of a military religion of "pluralism". The District of Columbia Circuit Court concluded that the Navy's violations of federal law, its own regulations and the Constitution could not be considered.

This case addresses the question whether the Court of Appeals can close its eyes to obvious and open statutory violations which prevented Protestant free exercise on American military bases in Italy and ultimately led to Petitioner's resignation as a Navy chaplain. *Sorrells v. U.S.*, 287 U.S. 435 (1932), *Mapp v. Ohio*, 367 U.S. 642 (1961) and *Rochin v. California*, 342 U.S. 165 (1952), hold in a pure

criminal context that courts should not close their eyes to or lend their powers to approve gross misconduct on the part of the government. Here, obvious statutory violations which protected the Petitioner chaplain's right to preach according to the customs and doctrines of his church were ignored by the Navy and the courts, authorizing the Navy's censorship and retaliation against the chaplain for failing to conform his sermons to an undefined doctrine called "pluralism among religions." When confronted with that question, the Court of Appeals looked at the constitutional dimensions of whether the Navy could require a chaplain to conform to its own view of the proper sermon and declined to address the issue.

> Veitch would have us confront a rather troubling constitutional question: whether chaplains in the armed services can be required to endorse "pluralism" in their religious practices. The services are understandably concerned about unit morale. And those of us old enough to remember World War II movies will recall scenes of chaplains at the front line performing services for soldiers of different religions. On the other hand, Reverend Veitch's argument that a chaplain cannot be obliged to preach counter to his or her religious beliefs consistent with the First Amendment is hardly a frivolous claim. Fortunately for us—and unfortunately for Veitch—we need not decide this difficult question. We agree with the district court that Reverend Veitch may not raise this issue because his resignation was voluntary and because the Navy did not act unreasonably in

> refusing to permit Veitch to withdraw his resigna'

App. at page A-5. The Court of Appeals either forgot or closed its eyes to the fact Congress had already spoken on the issue with § 6031 and the Navy had reproduced that statute in its regulations. Because Congress had spoken, the Court of Appeals had an obligation to address the question because it was obvious that the Navy had violated the statute and its own regulation. The Court of Appeals' decision is totally silent on § 6031.

The Court of Appeals also failed to address the consequences of the Navy's violations of § 6031 and the consequences to petitioner by objecting to its violation by his command chaplain. By ducking both the statutory and constitutional dimensions, the Court of Appeals failed to follow this Court's rule that the appellate courts have a special responsibility to examine Establishment Clause issues. By so doing, it gave court approval to an obvious and gross statutory and constitutional violation, allowing a Catholic to abridge Protestant free exercise, denying Petitioner of his rights and blessing the Navy's blatant violation of the rule of law. Once the legality of the basis and source of information for all the Navy's adverse actions, the flawed Equal Employment Opportunity ("EEO) report, is addressed in the context of § 6031, all of Respondents' actions against Petitioner become not only retaliation, but violations of the Establishment, Free Exercise, and Due Process Clauses.

The lower courts ignored the obvious violation of § 6031, its consequences and the adverse action which flowed from Respondents' faulty investigations. The lower courts

thereby incorrectly concluded that Petitioner resigned voluntarily. This inherently assumed that objection to a senior chaplain's censorship of Petitioner's sermons in private e-mails was disrespect, and it treated the circumstances surrounding that resignation and subsequent quest to withdraw it as having no consequence to the question.

At both the district court and the Court of Appeals, petitioner argued that all of the events which led to his resignation, including misconduct charges for disputing his Catholic command chaplain's right to censor sermons in a Protestant congregation, were based on the EEO investigation report which falsely and unconstitutionally concluded that petitioner *must preach* pluralism among religions. The command also believed that petitioner must preach pluralism among religions, as shown on a comment on Petitioner's fitness report, "Removed from his pulpit for failure to preach pluralism among religions." This erroneous belief motivated the command impermissibly to encourage the command chaplain to continue his illegal harassment and bias against Petitioner which led to his sending further emails defending his rights. This erroneous belief also motivated the command to characterize previous emails as disrespectful, and to produce untimely unauthorized (and unsubstantiated) absence charges from the command chaplain's secret, erroneous file, unknown to Petitioner.

The Court of Appeals and the District Court also ignored the impact of the Naval Inspector General's (NIG) failure to adequately examine the EEO complaint and its resultant illegal conclusion, upon which the Secretary of the Navy relied in refusing to allow Petitioner to withdraw his

resignation. The Department of Defense had directed such review and raised doubts as to the EEO's validity. A-16 n.5. It is obvious that had the NIG done its job and applied § 6031, it would have had to come to the conclusion that the EEO report was erroneous, and that all the actions against Petitioner that followed were retaliation because those adverse actions against Petitioner sprung from that report.

The underlying action involves a dispute between a Catholic senior chaplain and Petitioner, the senior Protestant chaplain but junior in rank to the senior, over the junior chaplain's sermons which the Catholic chaplain did not like. A series of e-mails between these two chaplains ensued. When petitioner filed an EEO complaint asking whether a Catholic command chaplain could censor his sermons to his Protestant congregation, the EEO investigator concluded Petitioner had failed to comply with a Navy doctrine called "pluralism", which meant that a chaplain's sermon could not offend anyone in the audience. In making his report, the EEO investigator ignored 10 U.S.C. § 6031 which specifically states that a chaplain "may conduct public worship according to the norms and customs of the church of which he is a member" and Navy Regulation 0817 which implements § 6031, "Chaplains shall be permitted to conduct public worship according to the manner and forms of the church of which they are members". There was no dispute that Petitioner's sermons were in accord with the norms and customs of his church and with general Protestant beliefs, yet the EEO investigator found they violated pluralism because someone could be offended in the congregation. A subsequent investigation by the Navy Inspector General (NIG) also concluded that Petitioner's sermons violated pluralism and that the EEO investigator's report was correct. The NIG also ignored § 6031 and NR 0817.

The basic nature of the issues surrounding § 6031 are also shown in the Navy's treatment of e-mails between Petitioner and his command chaplain. They addressed religious topics such as sermons and preaching, *e.g.*, Petitioner asked for clarification of the Catholic chaplain's comments about Petitioner's sermons being anti-priest. A-28. And although they were between two different denominational representatives with fundamentally opposite denominational perspectives, the fact Petitioner objected to censorship was considered disrespect, although Petitioner was merely exercising the right § 6031 provided him. The e-mails have no vulgar language nor directly communicate disrespect, merely disagreement.

The governmental misconduct in this case increased when Petitioner requested an equal opportunity investigation to determine whether his command chaplain could censor his sermons. The EEO investigator concluded the command chaplain could because Petitioner was not preaching according to a mandatory Navy religious doctrine the investigator defined as "pluralism", which he explained as preaching in a manner that would not offend anyone, regardless of faith perspective, who might be in the congregation.

The EEO investigator's report to the command included an e-mail between Petitioner and the command chaplain over the sermons, and the command concluded that petitioner was disrespectful because as a junior officer he challenged the command chaplain' attempt to censor his sermons.

Another exchange of e-mails concerning religious issues in which Petitioner objected to continued maltreatment and disrespect by the command chaplain led the command to bring disciplinary charges against petitioner for disrespect to his command chaplain. After this decision, the command chaplain also alleged that petitioner had missed some formations months before - events which had never before been mentioned but which the Command included in its disciplinary charges.

Petitioner declined non-judicial punishment, insisting on court-martial, and then, at the suggestion of the command's JAG, submitted his resignation, after which the charges were withdrawn. Petitioner then filed an Inspector General's complaint asking for an investigation of the actions taken against him following his filing of his EEO complaint and review of the EEO investigator's conclusion concerning pluralism. The Department of Defense specifically directed the NIG to investigate the validity of the EEO investigator's conclusions concerning pluralism. With the acceptance of his complaint, Petitioner requested the Secretary of Navy allow him to withdraw his resignation. The Secretary suspended the resignation until the NIG completed its task.

The NIG ignored § 6031, NR 0817, and concluded the EEO report was correct because it believed Petitioner had to preach pluralism and had not. Because it ignored the obvious implications of censorship of Petitioner's sermons, and the legality of the EEO investigator's report, the NIG concluded Petitioner's problems, which stemmed from the EEO report, were the result of his own misconduct. After the NIG issued its report, the Secretary discharged Petitioner.

Petitioner challenged in the courts below the voluntariness of his resignation as a Navy chaplain. He claims the resignation was coerced because (1) the EEO Report forming the source and basis for the command's disciplinary action against him was based on illegal findings that he must preach "pluralism" among religions, a Navy religious doctrine and requirement the command believed was mandated by the Navy, and he was disrespectful for objecting to the command chaplain's attempt to impose pluralism on his sermons; (2) those findings violate the Constitution, 10 U.S.C. § 6031, and Navy regulations; (3) the command's subsequent disciplinary action based on the EEO report's legal conclusion was illegal retaliation and coercion; (4) the resulting NIG report failed to consider 10 U.S.C. § 6031 and regulatory protections for chaplains conducting worship services; (5) his Judge Advocate General (JAG) legal counsel failed to inform him of the only relevant case addressing whether a chaplain could be a superior commissioned officer under Article 89; and (6) the Navy created a culture of religious prejudice that led to a constructive discharge.

During discovery, both the EEO and NIG investigators admitted they were clueless about § 6031 and NR 0817, did not consider the statute or regulation, but claimed they would have made no difference in the report's conclusions. Petitioner's Commanding Officer was familiar with both the statute and regulation but testified that he could censor a chaplain's sermons. Although he had not reviewed Petitioner's sermons, the Commanding Officer nevertheless found them offensive because they violated pluralism. The record shows the Commander's JAG also

concluded Petitioner's preaching violated the Navy's doctrine of pluralism.

After discovery, both sides filed for summary judgment. The District Court granted Respondents' summary judgment, found Petitioner's resignation was voluntary, and dismissed the case. Petitioner appealed to the Court of Appeals for the District of Columbia which denied his appeal on November 28, 2006.

REASONS FOR GRANTING THE WRIT

Petitioner's fitness report states: "Removed from his pulpit for failure to preach pluralism among religions." Absent this Court's review, this case will be a precedent for courts to disregard gross governmental misconduct in military cases. It will also be a precedent for allowing and tacitly approving the repression of free exercise in the military depending on the whim and religion of the command chaplain or commander.

For eight years the military and the lower courts have turned a blind eye to the suppression of the free exercise of Protestant evangelicals on American military bases in and around Naples, Italy. Petitioner's Catholic command chaplain was entrusted with government power to provide for the free exercise of all faiths. Instead, the facts of the case demonstrate that he created and maintained a hostile and intimidating environment in Protestant chapel congregations. The facts show he attempted to subvert their free exercise by forcing Petitioner to preach a religious doctrine called pluralism among religions to his Protestant congregation. Rather than reject the idea that a Navy official can dictate what a chaplain can preach, or a Catholic may

determine what is best for a Protestant evangelical congregation, the Navy defends both the Commander's determination Petitioner was required to preach pluralism and his subsequent decision to punish Petitioner for defending his rights. The lower courts impermissibly avoided coming to grips with the effect of the gross governmental misconduct in this case. Without the governmental misconduct which repressed Petitioner, his congregation and his community, he would have not have been removed from his ministry and career.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

A. Courts Are Not to Participate in or Sanction Governmental Misconduct.

In *Sorrells v. United States*, 287 U.S. 435 (1932), this Court overturned the conviction of a man who had been entrapped by government officials. The Court held that government action should not incite violations of the law. *Id.* at 448, 451. Subsequent decisions have expressed the idea that courts should not close their eyes when government conduct "falls below standards ... for the proper use of governmental power." *Sherman v. United States*, 356 U.S. 369, 382 (1958) (Frankfurter, J. concurring). This Court has required law enforcement officials to "respect certain decencies of civilized conduct" while rejecting actions that "offend a sense of justice." *Rochin v. California*, 342 U.S. 165, 173 (1952) (citing *Brown v. State of Mississippi*, 297 U.S. 278, 285-86 (1936)). *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) rejected the idea that officers "in the name of law enforcement itself" could suspend the law. This was because "judicial integrity" was "so necessary in the true administration of justice." *Id.*

As the Court noted in *United States v. Russell*, 411 U.S. 423, 430 (1973), "the principal reason behind the adoption of the exclusionary rule was the Government's 'failure to observe its own laws.'" (citing *Mapp v. Ohio*, 367 U.S. at 659).

These cases indicate the courts cannot become a participant in or sanction gross governmental misconduct. They reflect the principle expressed in Mr. Justice Brandeis oft quoted dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928): "If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." These were criminal cases and expressed concern for due process of law.

> Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of or judicial process. *See* Cardozo, The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

Rochin, 342 U.S. 170-71.

The question Petitioner raises is whether these same principles that preclude the courts from shutting their eyes to obnoxious violations of the law in the criminal context also apply in this case. If the fruit of a poisonous tree allows a criminal to escape conviction, can courts close their eyes and ears to open and notorious governmental misconduct that results in an unaddressed adverse action against the victim of the government misconduct? The underlying action which led to Petitioner's resignation stems from government violations of a clear statutory right to preach according to the customs of his church. Petitioner's objections to these violations, which came to his command's attention only because he sought to protect that right by asking for an EEO investigation, form the basis for the command's subsequent disciplinary action for "disrespect." The EO investigator concluded Petitioner violated a Navy doctrine called "pluralism" which required Petitioner to preach in a manner that would offend no one, real or potential, in his congregation. The record is clear that the command not only adopted the EO investigator's conclusion, but earnestly believed that it could evaluate a chaplain's sermon and censor it if it was not pluralistic. Petitioner's fitness report states: "removed from his pulpit for failure to preach pluralism." This raises obvious Establishment, Free Exercise and Free Speech issues. Indeed, Congress had already decided in 10 U.S.C. § 6031 that chaplains could "conduct public worship according to the norms and customs of the church of which they are a member."

Petitioner has been rebuffed at every level at which he sought a decision on the question of whether the Navy may censor his sermons and take action against him because of his defense of the right the statute provided. The EEO

and the NIG investigators both ignored § 6031 and its obvious controlling impact when they investigated whether (1) a command chaplain could censor a junior chaplain's sermons and (2) the junior chaplain was required to preach pluralism among religions to a congregation that rejected such a belief. The lower courts deftly sidestepped this issue. Although the Court of Appeals specifically acknowledged "Veitch would have us confront a rather troubling constitutional question: whether chaplains in the armed services can be required to endorse 'pluralism' in their religious practices," A-5, it totally ignored the fact that Congress had already spoken on the issue. Although Petitioner pointed out to the Court of Appeals this Court's precedents likewise addressed this question and have held that the government has no business evaluating a sermon or prayer, *e.g.*, *Fowler v. State of R.I.*, 345 U.S. 67, 69-70 (1953), he also emphasized that § 6031 addressed the issue and, in the context of the investigations, should have been an essential consideration because it was determinative of the issue. Petitioner had a right to preach in accord with the customs and doctrine of his church, which he did. The command chaplain's attempt to insert himself or place himself in the position of Petitioner's ecclesiastical authority is a violation of Petitioner's right under § 6031, not to mention the Constitution.

Petitioner argued the obvious at every level: Respondents had ignored the law and their own regulations. If § 6031 had been applied, the command chaplain would have been guilty of breaking the law. Petitioner's e-mails in defense of his right would be just that, evidence of defense. The command chaplain's actions in continuing to impose his own view of a proper sermon would be *ultra vires*, and would preclude the Navy from retaliating against Petitioner.

Additionally, the command's actions against Petitioner would have been retaliation, because all of those actions have their origin and source in the illegal and incompetent EEO report. This combination of gross indifference to a statute that specifically addressed Petitioner's conduct at issue and his defense of his rights constitute the same sort of gross governmental misconduct this Court found objectionable in *Sorrells, Mapp,* and *Rochin.* The question before the Court is whether the Court of Appeals had the obligation in a civil matter not to sanction what can aptly be described as gross governmental misconduct.

Petitioner's claim of governmental misconduct was before the lower courts. Resolution of that issue would have resolved all other issues in Petitioner's favor. Instead the courts sidestepped the issue. The Court of Appeals was technically correct when it said the EEO report did not result in Veitch's resignation. A-8. However, it is clear that the EEO report began a series of events that lead to that resignation and formed the basis for all of the command's adverse action against Petitioner culminating in his resignation. If this were a criminal case, all the fruit from the poison tree would be excluded. Here the tree was ignored and the fruit was blessed with judicial approval.

The NIG's failure to adequately and properly conduct this investigation into the EEO report is another example of gross governmental misconduct. There can be no other description for its failure to address the statutory and regulatory basis which was determinative of the issue before it, *i.e.* whether a senior Catholic chaplain could direct a junior Protestant chaplain what he should preach to his Protestant congregation.

The Court of Appeals ignored the fact that the NIG's failure to address the basic issue deprived the Secretary of critical information while he was deciding whether to allow Petitioner to withdraw his resignation. It is unreasonable to conclude that the Secretary would have refused Petitioner's resignation withdrawal request if the NIG done its duty and cast Petitioner as a victim and the command chaplain as a perpetrator. This is the only conclusion that can be drawn from the proper application of § 6031 to the facts concerning Petitioner's sermons and the command chaplain's attempts to censor them.

B. Courts Have a Duty to Carefully Examine Establishment Clause Claims

"What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertain whether it furthers any of the evils against which that Clause protects." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772 (1973); *County of Allegheny v. ACLU*, 492 U.S. 593, 609 (1989) (explaining court's duty of "unwavering vigilance" against Establishment Clause violations).

The Court of Appeals clearly recognized that Petitioner raised Establishment Clause claims. "Veitch would have us confront a rather troubling constitutional question: whether chaplains in the armed services can be required to endorse "pluralism" in their religious practices." A-5. Although § 6031 provides the clear answer, Petitioner's appeal raised specific Establishment Clause issues that flow from the underlying dispute. These concern the emails between Petitioner and his command chaplain. They were

private and in almost all cases addressed religious issues such as sermons and differences in theological perspectives.

The command chaplain never brought these e-mails to the command's attention, nor did he ever express concern that they were disrespectful or violated any rules of decorum. As the senior chaplain he had an obligation to inform and counsel the junior chaplain on any and all deficiencies. He never did this. The command only became aware of those e-mails because of the EEO investigation which included one e-mail. It is obvious that both chaplains considered these e-mails to be a discussion of religious issues between two clergy with conflicting theological viewpoints and positions. The precedents of this Court are clear that the government must be neutral in matters of religion and may not take sides in religious disputes. *E.g., Larsen v. Valente*, 456 U.S. 228, 244 (1982). Because of the essential religious nature of these e-mails, the Navy's actions subsequent to the illegal EEO report in effect show that it has taken sides. The Navy has established that a senior chaplain's opinion on a sermon is the same as law and the junior chaplain's duty is to salute and say "Aye, aye, Sir" regardless of whether it offends the junior chaplain's beliefs, the doctrines of his church, or his congregation. This also is gross governmental misconduct which the Court of Appeals had an obligation to examine and address.

The Department of Defense Instruction 1304.28 "Guidance for The Appointment of Chaplains for the Military Departments" defines chaplains as denominational representatives. This Court's precedents have clearly established that the government may not direct a religious organization how to pray or conduct its services. The Establishment Clause forbids the Navy establishing any

such doctrine is "pluralism among religions" or taking sides in religious disputes, and this includes censoring, directing or evaluating sermon content. *See, e.g., Fowler*, 345 U.S. at 69-70; *Lee v. Weisman*, 505 U.S. 577, 589-90 (1992). To allow a government official to do so results in the forbidden fusion of government and religious power. *Bd. of Education of Kiryas Joel v. Grummet*, 512 U.S. 657, 658-99 (1994), and *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982).

The Court of Appeals recognized that it was faced with Establishment Clause issues. "Veitch would have us confront a rather troubling constitutional question: whether chaplains in the armed services can be required to endorse "pluralism" in their religious practices." A-5. Although there was an obvious statutory violation for addressed the relevant question whether the Navy's actions concerning his sermons were legal, *i.e.*, § 6031, the Court of Appeals ignored its responsibilities to both address the obvious statutory violation and the constitutional implications.

II. THE DECISION BELOW UNDERMINES IMPORTANT NATIONAL POLICY

A. The Decision Encourages the Politicization of Religion

The Court has consistently warned against the fusion of government and religious functions, *Larkin*, 459 U.S. at 126, and the resulting "political fragmentation on sectarian grounds". *Larson v. Valente*, 456 U.S. 228, 252-53 (1982). Here, the Navy has assumed the forbidden power to censor a chaplain's sermons and abridge free exercise.

B, this Decision Effectively Authorizes the Establishment of an Official Navy Religion of "Pluralism"

This Court's precedents are crystal clear that the government may not establish a religion. *Wallace v. Jaffre*, 472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 576 (1987). In effect, this decision places the judiciary's imprimatur on the establishment of an official Navy religion called pluralism. Rather than denounce any implication resulting from the EEO investigator's report and the commander's basis for removing Petitioner from his pulpit, *i.e.*, "for failure to preach pluralism among religions", the Navy has defended this decision at every level. Unfortunately, the courts have winked at or ignored the obvious implications of allowing this unprecedented litigation position to stand, that Navy officials may determine the content of the chaplain's sermons insisting they must be in accord with the official Navy religion of pluralism among religions. Does this Court mean to allow the Armed Forces to establish their own religions?

III. THIS CASE RAISES FUNDAMENTAL FIRST AMENDMENT ISSUES OF FIRST IMPRESSION

This chaplain case stands at the intersection of the Free Exercise, Free Speech and Establishment Clauses. This Court has rejected the idea that the government may regulate religious speech based on the heckler's veto. *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2201). This Court has often cited military chaplains as examples of the accommodation available in the Constitution and the "play in the joints" of these two clauses. *See School Board of Abbington Township v. Shempp*, 374 U.S. 203,296-98 (1963)

(Brennan, J. concurring, citing chaplains as accommodation necessary to provide for the free exercise of religion by military personnel). The underlying issue posed by this petition is whether the judiciary will ignore the principles underlying *Sorrells, Mapp* and *Rochin* and allow the Navy to cast off its moorings to the rule of law and the Constitution and set its own course independent of law and judicial accountability.

CONCLUSION

For all the above reasons, the Court should grant this Petition for Certiorari.

Respectfully Submitted,

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